# A First Assessment of the New European Regulatory Framework for Electronic Communications

De Streel, Alexandre

*Published in:*
Communications et stratégies

*Publication date:*
2005

*Document Version*
Publisher's PDF, also known as Version of record

# A First Assessment of the New European Regulatory Framework for Electronic Communications (*)

**Alexandre de STREEL**
Faculty of Economics, University of Namur

***Abstract:*** This paper offers a first assessment of the so-called Significant Market Power regime in the European electronic communications sector nearly two years after its implementation. It details the substantive rules and the institutional design of the regime. It shows that, out of the six governance principles that the regime was deemed to achieve, two principles (flexibility and transparency) are broadly met, two principles (objectivity and harmonisation) are much better achieved than before, but still insufficiently met, and two principles (proportionality and legal certainty) may not be achieved. The paper submits that these shortcomings are due to the fact that the regime did not sufficiently take into account the incentives of regulatory agencies, was partly based on false assumptions, and did not arbitrate enough between different policy choices. Yet the paper suggests that the Significant Market Power regime should not be substantially reformed in the near future, but instead that regulators should change their attitudes: national regulators should take the principle of proportionality much more seriously and adopt a clearer strategy, while other regulatory agencies should ensure the absence of regulatory creep and greater harmonisation more actively.
***Key words:*** Regulation, Electronic communications, European Union, Governance principles and Institutional design.

## ■ The challenges of the electronic communications sector

The re-launch of the Lisbon strategy was accompanied by widespread acknowledgement that achieving policy objectives depends on the quality of the governance principles for regulatory actions, which, in turn, depends on underlying institutional design [1]. In electronic communications, this three factor relationship was clearly recognised in the definition of the New

(*) An earlier version of this paper was presented at the EURO CPR Conference, Potsdam (Germany), 13-15 March 2005.

1 Communication from the Commission of February 2nd 2005, Working Together for growth and jobs: A new start for the Lisbon Strategy, COM (2005) 24, at 34-37; SAPIR (2004).

Regulatory Framework [2] (NRF) that was to be implemented in EU member states by July 2003. The NRF pursues three goals, along six governance principles, with an accompanying complex institutional design.

The electronic communication policy pursue three goals [3]: (1) to promote and sustain effective competition on the market while preserving investment incentives, (2) to consolidate the internal market by ensuring similar regulatory approaches across member states and the delivery of pan-European services, (3) to benefit the European citizen by securing the best possible deal for consumers and universal access to basic services.

To meet these objectives, regulatory authorities need to follow six principles, which are generally accepted as good governance principles inherent to EU policies [4]:

- Regulation should be kept to a minimum to achieve the three goals mentioned above, which is another formulation of the well-known principle of proportionality [5]. This implies that the regulatory action pursues a legitimate aim, and that the means employed to achieve the aim are both necessary and the least burdensome. In fact, economic regulation is even destined to

---

[2] The NRF is mainly made up of four harmonisation directives and one liberalisation directive: Directive 2002/21/EC of the European Parliament and of the Council of March 7th 2002 on a common regulatory framework for electronic communications networks and services (*Framework Directive*), O.J. [2002] L 108/33; Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (*Authorisation Directive*), O.J. [2002] L 108/21; Directive 2002/19/EC of the European Parliament and of the Council of March 7th 2002 on access to, and interconnection of, electronic communications networks and services (*Access Directive*), O.J. [2002] L 108/7; Directive 2002/22/EC of the European Parliament and of the Council of March 7th 2002 on universal service and users' rights relating to electronic communications networks and services (*Universal Service Directive*), O.J. [2002] L 108/51; Commission Directive 2002/77/EC of September 16th 2002 on competition in the markets for electronic communications networks and services (*Liberalisation Directive*), O.J. [2002] L 249/21.

[3] Articles 8(2), 8(3), 8(4) of the Framework Directive.

[4] Communication from the Commission of 10 November 1999, The 1999 Communications Review - Towards a new framework for Electronic Communications infrastructure and associated services, COM (1999) 539, hereinafter 1999 Communications Review. See for instance, the ten principles mentioned in the survey of HANCHER, LAROUCHE & LAVRIJSSEN (2003): Transparency, Independence, Clear legislative mandate, Flexible powers, Proportionality, Consistency, Predictability, Accountability, Respect of general principles of competition policy, and Respect for EC law and effective cooperation with and within the EU. Compare with the 7 more focus principles of Ofcom (2004:58).

[5] Article 8(1) of the Framework Directive, Article 8(4) of the Access Directive, Article 17 (2) of the Universal Service Directive. See also, Guidelines on market analysis, para 118; ERG Common Position on Remedies, at para 4.2.1, cited *infra.* On the proportionality principle in EU law, see: CRAIG & de BURCA (2002); *Fedesa* C-331/88 ECR [1990] I-4023, para 13, cited in the Common Position remedies, at 62.

disappear in the long run to the benefit of the mere application of competition law [6], although for the time being, there is a broad consensus that economic regulation is still justified [7].

- Regulation should be flexible to be able to respond to rapid market developments. This has two implications: on the one hand, on a European level, EU law should provide only for general objectives and minimal procedure requirements to allow differentiation across member states. On the other hand, on a national level, broad power and a margin of discretion should be left to regulatory players, particularly National Regulatory Authorities (NRAs).

- Regulation should be objective and non-discriminatory, i.e. all equivalent services should be treated in the same way so as not to distort investment decisions. One specific application is that regulation should be technologically neutral [8] to take convergence into account, i.e. all technologies and operators offering the same services should be treated equally.

- Regulation should be transparent [9]. This has two implications. Firstly, legislation and the number of legal instruments should be reduced to the minimum; and secondly, all regulators should widely consult the stakeholders and make their information and decisions easily accessible to outsiders.

- Regulation should be based on clearly defined policy objectives [10]. By the same token, regulation should ensure legal certainty and be consistent over time to allow companies to make investment decisions with confidence. This implies that regulators should have a clear and stable strategy, and should follow strict procedures before taking decisions.

---

6 See the position of the three main the European institutions: 1999 Communications Review, at 49; Resolution of the European Parliament of June 13th 2000 on the 1999 Communications Review of the Commission, O.J. [2001] C 67/53, at point A; Statement of Reasons of the Council Common Position 38/2001 of September 17th 2001 on the Framework Directive, O.J. [2001] C 337/51, at para II.1. This idea of a temporary sector regulation was already present in the Littlechild Report of 1983. However, this position is severely criticized by LAROUCHE (2000: chapter 4) and (2002:140), who argues that the specificities of the electronic communications sector, and in particular the prevalent presence of bottlenecks and network effects, justify permanent economic regulation in the form of supplier, customer, and transactional access.

7 Ofcom (2005:14).

8 Article 8(1) and Recital 18 of the Framework Directive.

9 Articles 3 and 6 of the Framework Directive.

10 Article 8(2) to 8(4) of the Framework Directive.

• Finally, European regulatory bodies should share a common regulatory culture to ensure the establishment of a single market for electronic communication services. At the same time, regulation should be enforced as strictly as practicable on the activities being regulated. This is another formulation of the well-known principle of subsidiarity [11], whereby the Community shall take action only if, and in so far as, the objectives of the proposed action cannot be sufficiently achieved by member states and can therefore, due to the scale or effects of the proposed action, be better achieved by the Community.

This paper studies whether these six governance principles have been fulfilled in practice nearly two years after the implementation of the new regulatory framework. After this introduction, the second part focuses on substantive law and explains the new economic regulation aimed at controlling market power, the so-called Significant Market Power (SMP) regime. The third part focuses on institutional law and details the role of regulatory agencies in the SMP regime. The following section reviews the achievement of governance principles in practice, and suggests how the governance of the sector could be improved. The scope of this paper and its conclusions are limited to the SMP regime and does not extend to other aspects of regulation (like entry authorisation, universal service or consumer protection rules), since SMP regulation is the most far reaching and the most discussed part of the new regulatory framework.

## ■ The significant market power regime and its initial implementation

To impose obligations on operators enjoying significant market power in order to prevent any abuse and/or to mimic competition, regulatory agencies should take the following three steps [12]:

• In the first instance, markets to be regulated are to be defined. For national or infra-national markets, that should be carried out in two sequences. In a first sequence, the Commission periodically adopts a

11 Article 5 EC.

12 Articles 14-16 of the Framework Directive: BUIGUES, 2004; CAVE, 2004A; GARZANITI,2003: chapter 1; KRÜGER & DI MAURO, 2003; NIHOUL & RODFORD, 2004: chapter 3; de STREEL, 2004.

Recommendation [13] where it selects the markets justifying *ex ante* regulation due to the inefficiency of antitrust remedies to solve the possible competitive problems (due to high entry barriers to the market, the absence of competitive dynamics behind these barriers, and the need for rapid, sure intervention [14]) and then delineates the boundaries of these markets on the basis of antitrust methodology [15]. In a second sequence and taking into account this Recommendation on relevant markets and the Commission Guidelines on market analysis [16], each NRA defines markets appropriate to national circumstances, particularly their geographical dimension within its territory, in accordance with the principles of competition law. Thus, the NRAs have the flexibility to define markets differently than those proposed by the Commission. For trans-national markets (i.e. those which cover the Community or a substantial part thereof [17]), there is only one sequence. The Commission selects and delineates the markets in a decision according to antitrust principles, with no flexibility left to national regulators.

- In the second step, the NRA analyses the defined markets to determine whether one or more operators enjoy SMP in these markets, which amounts to determining whether one or more undertakings enjoy a dominant position or could leverage a dominant position from a closely related market. Under European competition case law [18], a firm enjoys a dominant position when, alone or collectively with others, it has sufficient market power to behave independently of competitors, customers, and ultimately consumers to an appreciable extent.

- In the third step, the NRA imposes the appropriate specific regulatory obligations to be chosen from a menu provided in the Directives (transparency, non-discrimination, accounting separation, compulsory

---

13 Commission Recommendation 2003/311 of February 11th 2003 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, O.J. [2003] L 114/45, herein Recommendation on relevant markets.

14 Recommendation on relevant markets, recitals 9 to 16.

15 Commission Notice on the definition of relevant market for the purposes of Community competition law, OJ [1997] C 372/5.

16 Commission Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services, O.J. [2002] C 165/6, herein Guidelines on market analysis.

17 Guidelines on market analysis, para 122.

18 *United Brands* 27/76 [1978] ECR 207; *Hoffman-La Roche* 85/76 [1979] ECR 461; *AirTours* T-342/99 [2002] ECR II-2585, para 62; Guidelines on market analysis, para 70 to 106.

access and price control [19]), or any other type of remedy with the prior agreement of the Commission on SMP operators. Remedies should be chosen according to four principles: the remedy should be based on the nature of the problem, justified with regard to one of the three objectives of the NRF, proportionate (i.e. the least burdensome), and incentive compatible (i.e. designed in such way that the advantages of compliance outweigh the benefits of evasion for the regulated party). In fact, the new regime should corral the NRAs down the path to de-regulation, allowing them to proceed at their own speed and within a uniform framework necessary for the internal market (BUIGUES, 2004; CAVE, 2004).

After having completed this three-step analysis, the NRAs notify the Commission of each draft decision that affects trade between member states [20] according to Article 7 procedure [21]. The Commission then reviews the draft decision in two phases. During the first phase of one month, it has three options: firstly, to open a second phase review of two additional months when it has serious doubts as to the compatibility of the two first parts of the draft decision with European law (e.g. market definition that differs from the Commission Recommendation on relevant markets, and designation – or non designation – of SMP operators), secondly, to comment only on the compatibility with European law of each part of the draft decision (market definition, SMP assessment and choice of remedies), or thirdly to decline to comment. In the case of a second phase review, the Commission may veto a market definition or SMP designation that contradicts European law, after consulting a Committee composed of member state representatives (the Communications Committee). To deal with such short

19 Articles 9 to 13 of the Access Directive for the remedies regarding the wholesale markets; and Articles 17 of the Universal Service Directive on remedies for retail markets. European Regulators Group Common Position of April 1st 2004 on the approach to appropriate remedies in the new regulatory framework, ERG (03) 30rev1, herein Common Position on remedies.

20 According Recital 38 of the Framework Directive, "Measures that could affect trade between Member States are measures that may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States in a manner that might create a barrier to the single market. They comprise measures that have a significant impact on operators or users in other Member States (…)".

21 Article 7 of the Framework Directive and Commission Recommendation 2003/561 of 23 July 2003 on notifications, time limits and consultations provided for in Article 7 of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services, OJ [2003] L 190/13. If a NRA does not notify the Commission of its draft decision, the Commission may take an infringement procedure against that Member State. In addition, the NRA measure might not have any effect in the national legal order. For a similar solution in the context of the transparency Directive 83/189, see: *Securitel* C-194/94 [1996] ECR I-2201 para 45-55 and Sapod Audic C-159/00 [2002] ECR I-5031 para 47-53.

deadlines, the Commission and NRAs hold pre-notification meetings to discuss any controversial issues in advance [22].

In practice, as illustrated in Annex 1, the Commission identified in its first Recommendation of February 2003 [23] eighteen national or infra-national markets to be analysed by NRAs: seven retail markets, three wholesale markets related to fixed narrowband, two wholesale markets related to fixed broadband, two wholesale markets related to leased lines, three wholesale markets related to mobile and one wholesale market related to broadcasting transmission. Thus, for the 25 member states, that makes a total of at least 450 markets to be dealt with by NRAs. However, no trans-national market has been identified to-date [24].

By June 2005, 133 [25] such markets had already been analysed by the national regulators of 13 member states and commented on by the Commission. The results of these analyses are summarised in annex 2 and reveal several trends. Firstly, the implementation of the regime has taken longer than expected as, two years after its application, only 30% of the overall task has been completed. Any observation made at this stage is thus preliminary. Secondly, the influence of the Commission in the process is considerable. Indeed, NRAs tend to follow the markets defined by the Commission (in 73% of cases) and not to rely on their flexibility to select or delineate markets differently. In addition, the Commission has already vetoed five draft decisions from Austrian, Finnish, and German regulators (3.7% of cases) and eight other draft decisions from Danish, French, Swedish and British regulators have been withdrawn to alleviate such a veto. Thirdly, regulation is increasing. More market segments are being regulated [26] and more operators are now regulated in each market

22 As of December 2004, 62 pre-notification meetings were held with NRAs from 15 Member States: Annex of Communication from the Commission of 2 December 2004, European Electronic Communications Regulation and Markets 2004, COM (2004) 759, hereinafter the 10th Implementation Report, at 69.

23 See note 13.

24 Note that the Commission is looking at a possible trans-national wholesale market for broadcasting transmission service via a satellite platform.

25 Note that this corresponds to more notifications made by the Commission (nearly 200 notifications analysed so far), because some NRAs do separate notification of market definition and SMP analysis, and the choice of remedies.

26 Public intervention is progressively extending to the bitstream (Market 12) or even wholesale line rental (that may be imposed like a remedy on the retail access market, or after the definition by the NRA of an additional market subject to the veto of the Commission), and to mobile origination (Market 15).

segment [27]. In addition, NRAs continue to impose the full suite of remedies on these operators, without choosing the most appropriate ones or creatively thinking of other obligations that may really lead to de-regulation (like allowing spectrum trading, imposing bill-and-keep or receiver party pays principle in the mobile, or removing impediments to the development of Voice over IP).

## ■ The institutional design

To meet the six governance principles, the NRF provides for an institutional design that leaves the main responsibilities to NRAs, with several checks and balances at national and European levels to guarantee in particular minimal and harmonised regulation. These complex relationships are illustrated in figure 1 below and subsequently explained in greater detail by distinguishing deciding from controlling regulatory agencies.

### The deciding authorities: National Regulatory Authority in conjunction with the European Commission

The first deciding authority is the European Commission [28] which adopts a Recommendation on relevant markets about every two years. In practice, this role is extremely important as it starts the whole process and the markets defined by the Commission tend to be adopted by NRAs.

The second, and in fact the main, decision makers are the National Regulatory Authorities [29]. They have to define the markets to be regulated in their own countries, analyse them and decide upon the remedies to impose. In doing so, they enjoy a broad margin of discretion.

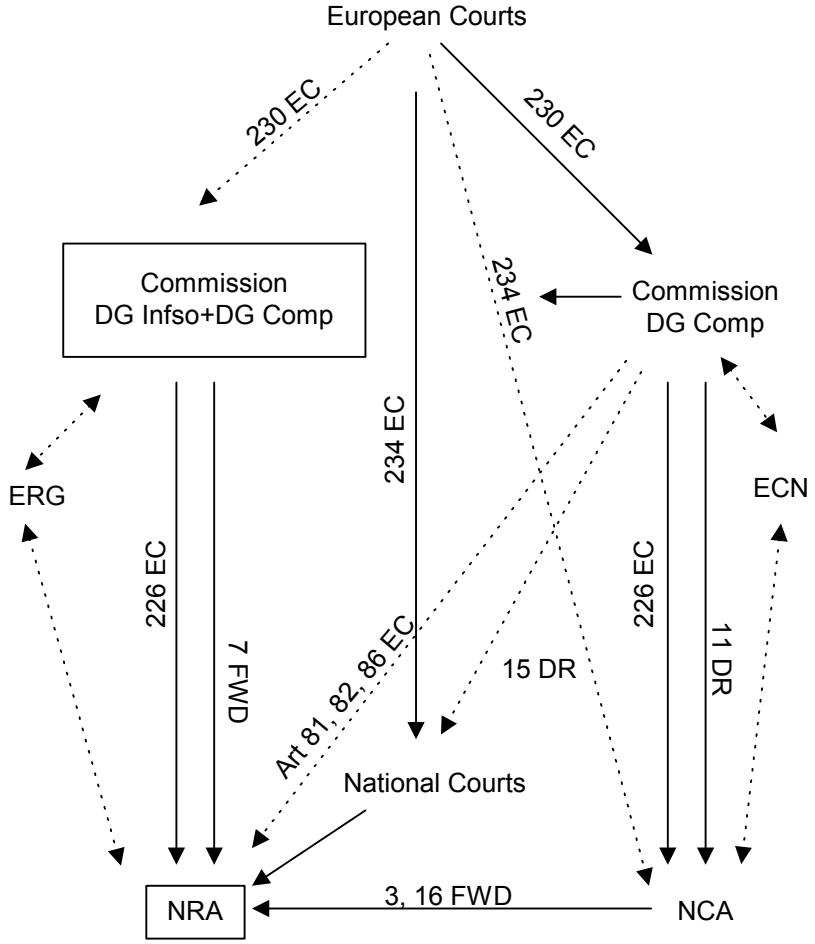
---

[27] With a single network market definition for fixed and mobile termination, all big and small operators are regulated, although regulation may be asymmetric, i.e. less intrusive for small operators.

[28] In effect, Information Society and Media Directorate-General jointly with the Competition Directorate-General.

[29] Each member state should have at least one NRA according to Article 3 of the Framework Directive. On the NRA, see GERADIN & PETIT, 2004; STEVENS & VALCKE, 2003.

**Figure 1: Relationship between regulatory actors**




For simplicity, the role of the National Ministries, the CoCom and the Council is not included.
Straight line: Strict control and dotted line: Loose control
EC: EC Treaty
FWD: Framework Directive 2002/21
DR: Decentralisation Regulation 1/2003
ERG: European Regulators Group
ECN: European Competition Network
DG Infso: Information Society and Media Directorate-General of the European Commission
DG Comp: Competition Directorate-General of the European Commission

To ensure appropriate regulatory decisions, the Framework Directive [30] provides that member states should ensure independence with regard to the operators, transparency, accountability and staff competencies of their NRAs [31]. To ensure that country externalities are taken into account in European disputes, the Directive [32] also provides that NRAs should collaborate in the analysis of trans-national markets and the resolution of cross-border disputes. However, much remains to be decided by member states because of their procedural autonomy [33]. In practice [34], every member state now has one or more strong NRA, although concerns remain in some member states regarding the clarity of the allocation of tasks between NRAs [35], the independence and impartiality of these NRAs [36], their powers and their margin of discretion [37], their resources [38], and their consultation and transparency requirements [39].

**The national controlling agencies: the national competition authority and the national appeal body**

To balance these important powers, several authorities control the NRAs. The first controlling agents are the National Competition Authorities, who have been given a more powerful role since sectoral regulators now have to rely on antitrust methodologies. The Framework Directive [40] provides that NRAs and NCAs should cooperate with each other and exchange

30 In particular, Articles 3 to 8 of the Framework Directive.

31 Note that, according the general principle of effectiveness of EU law, member states should give their NRAs sufficient powers and resources to ensure they can fulfil their tasks. According to the internal market and antitrust principles of the EC Treaty (GB-Inno-BM C-18/88 [1991] ECR I-5941, para 28; Terminal Directive C-202/88 [1991] ECR I-1223, para 51), member states should ensure that their NRAs are independent of operators.

32 Articles 7(3), 16(5), 21 of the Framework Directive.

33 Some indications on the quality of each regulator may be found in ECTA (2004) and in the 10th Implementation Report.

34 Annex to the 10th Implementation Report, at 8-12, 15, 24.

35 In France, Lithuania, Malta, Poland.

36 In some of the new member States: Cyprus, Latvia, and Slovenia.

37 In Finland, Germany, Hungary, Ireland, Malta, Netherlands and Portugal.

38 In Cyprus, Latvia, Lithuania, Luxembourg, Poland, Slovakia, and Sweden.

39 In Germany, Greece, Latvia, the Netherlands, Slovakia, Lithuania and Spain.

40 Articles 3(4), 3(5) and 16(1) of the Framework Directive, and para 135 Guidelines on market analysis. Note that each member state should have a Competition Authority according to the Article 5 of the Council Regulation 1/2003 of December 16th 2002 and the implementation of the competition rules laid down in Article 81 and 82 of the Treaty, O.J. [2003] L 1/1.

information on market analysis [41]. However, the organisation of the relationship between both authorities is left to member states due to their procedural autonomy and varies considerably [42], ranging from concurrent powers for NRAs to apply competition law [43], to formal cooperation agreements between both authorities [44], to informal exchanges of information [45]. In all events, NCAs are now systematically consulted on market analysis in most of member states [46].

The second national controlling agencies are the independent appeal bodies. The Framework Directive [47] provides that member states should put in place effective appeal mechanisms against the NRAs' decisions to an independent appeal body, which may be a national court. The intensity of the courts' review varies across member states according to their national administrative traditions. In practice, the appeal body is a court in most member states, and in many, a court specialising in antitrust matters [48]. Some decisions adopted under the new SMP regime have already been appealed in Finland, Sweden and the United-Kingdom [49]. More critically, in several member states, there is a systematic appeal of NRA decisions [50].

---

41 Note that, according to the primacy of EC law and the obligation of NRAs not to contradict or undermine EC antitrust law, member states should ensure that their NRAs work together with their NCAs: *GIB/ATAB* 13/77 [1977] ECR 2115, para 31; *Leclerc* 229/83 [1985] ECR 1; *Van Eycke* 267/86 [1988] ECR 4769, para 16; *Ahmed Saeed* 66/86 [1989] ECR 1839.

42 The relationships between NRA and NCA have been extensively studied in literature: OECD, 1999a, 1999b; ICN, 2005.

43 Like in the United Kingdom: Office of Fair Trading Guidelines of December 2004 on Concurrent application to regulated industries.

44 For example in the Netherlands: OPTA and NMa Cooperation Protocol of 24 June 2004.

45 Note that in 2002 the Netherlands even contemplated integrating the NRA with the NCA. This project was later abandoned.

46 Annex to the 10th Implementation Report, at 16, noting problems in Austria, Estonia, Hungary, Lithuania, and Poland. Note that the opinion of the NCA strongly influences the Commission when reviewing the NRA draft decision under Article 7, as well as the national court in case of an appeal against the NRA decision.

47 Article 4 of the Framework Directive. Note that the Court judged, contrary to the Opinion of the Advocate General Geelhoed, that Article 5a(3) of the previous ONP Directive 90/387 as modified by Directive 97/51 has a direct effect and that national appeal body should dis-apply any contrary national law (*Connect Austria* C-462/99 [2003] I-5197, para 38 to 42). This jurisprudence is equally valid under the NRF. For an overview of the role of the Courts under the previous regulation: see British Institute of International and Comparative Studies (2004).

48 Annex to the 10th Implementation Report, at 13.

49 Annex to the 10th Implementation Report at 213, 217, 215.

50 In Belgium, Germany, Greece, the Netherlands Portugal and Sweden.

**European controlling agencies: the European Commission, the European Regulator Group and the European Courts**

At a European level, the first controlling authority is the European Commission, which has three powers. Firstly, the Commission [51] controls NRAs directly and ex post with infringement proceedings. When a member state (or its NRA) violates EU law, the Commission may open an infringement procedure before the Court [52]. In practice, the Commission has only launched infringement procedures for inappropriate implementation of European Directives by national legislators [53], but has never taken steps to address the violation of European law by an NRA to-date. Such a powerful weapon is only used as a last resort [54] and the Commission relies primarily on informal pressure mechanisms, like bilateral and multilateral contacts in the regulatory fora or the annual implementation reports [55].

Secondly, the Commission [56] controls NRAs indirectly and ex post with antitrust proceedings. Indeed, European competition law applies in addition to national sector-specific rules to member states (and their NRAs), as well as to private and public telecom operators [57]. In practice, the Commission relies on antitrust actions extensively and far reachingly to support its liberalisation program, to the extent that some have discerned a regulatory antitrust or a sector-specific competition law in the electronic communications sector (CAVE & CROWTHER, 2004; de STREEL, 2004;

51 In effect, its Information Society and Media Directorate-General for the harmonisation Directives and its Competition Directorate-General for the liberalisation Directives.

52 As noted by Geradin (2004:1550): although the ECJ has never yet had the opportunity to rule that a member state infringed EC law due to unlawful action by a NRA, nothing prevents such case. Indeed, the case law makes a broad interpretation of the categories of public entities that render a member state liable for their actions: Fratelli Costanzo 103/88 [1989] ECR I-1839.

53 In October 2003 the Commission opened infringement proceedings against eight member states for late transposition (IP/03/1356 of 8 October 2003). In April 2004, the Commission opened infringement proceedings against ten member states for incorrect transposition (IP/05/430 of April 14th 2005).

54 Communication from the Commission of December 11th 2002, Better monitoring of the application of Community law, COM (2002)725, adopted as a follow-up of the White Paper on the European Governance.

55 <http://www.europa.eu.int/information_society/topics/ecomm/all_about/implementation_enforcement/index_en.htm>.

56 In effect, its Competition Directorate-General.

57 On the application of competition law to electronic communications, see: de STREEL, 2004; GARZANITI, 2003: chapters 7 and 8; LAROUCHE, 2000: chapter 3. On the antitrust power of the Commission to control NRAs, see GERADIN, 2004; LAROUCHE, 2005, and implicitly Access Notice, para 11-38.

LAROUCHE, 2000; UNGERER, 2001). Indeed, the Commission issued guidelines setting out its interpretation of European antitrust regarding particular problems in the electronic communications sector [58], opened wide-ranging sector enquiries to investigate generic competition problems (CHOUMELOVA & DELGADO, 2004), opened several individual cases of abusive practices and reviewed several instances of concentration triggered by the reshaping of the business landscape after liberalisation. In individual decisions, the attitude of the Commission depended on two factors: the powers of NRAs to intervene under their own national sector regulations and the type of control of the Commission (*ex ante* merger control or ex-post 82 EC control). Thus if the sectoral regulator is able to act, the Commission forbears by imposing light remedies in the case of ex ante merger control [59] and by passing the case on to the national authority in case of ex-post abusive action [60]. However, if the NRA is not acting satisfactorily and provided the regulated operator enjoyed a minimal discretion within the regulatory limits to reduce the abusive practice, the Commission has gone so far as to condemn the regulated operator [61]. Alternatively, if the sectoral regulator was not able to act, the Commission imposed far reaching remedies in the case of ex ante merger control [62], and condemned the operator in cases of *ex-post* abusive action [63].

These two control mechanisms were not considered sufficient to secure the harmonisation principle given the increased powers of the national regulator, so the NRF provides for a new and more original power as the Commission controls NRAs directly and *ex ante* with the Article 7 review.

---

58 Three such guidelines have been adopted: Commission Guidelines on the application of EEC Competition rules in the Telecommunications sector, O.J. [1991] C 233/2; Commission Notice of March 31st 1998 on the application of competition rules to access agreements in the telecommunications sector, O.J. [1998] C 265/2, herein Access Notice; Communication from the Communication of 26 April 2000 on the unbundled access to the local loop, O.J. [2000] C 272/55.

59 For instance, Commission Decision of 27 July 1994, *BT/MCI* (I), O.J. [1994] L 223/36.

60 For instance, the cases related to excessive fixed retention and termination rates: IP/98/1036 of November 26th 1998; IP/99/298 of May 4th 1999.

61 Commission Decision of May 21st 2003, *Deutsche Telekom*, O.J. [2003] C 264/29, under appeal T-271/03

62 For instance, Commission Decision of October 13th 1999, *Telia/Telenor*, M. 1439, O.J. [2001] L 40/1; Commission Decision of 12 April 2000, *Vodafone/Mannesmann*, M. 1795.

63 For instance, Commission Decision of July 16th 2003, *Wanadoo*, not yet published, under appeal T-340/03.

The degree of the Commission's control [64] over NRAs' draft decisions would be similar to that of the Court of Justice over the Commission's decisions and follows a two-prong approach. For market definition and SMP analysis (i.e. the antirust aspects of draft decisions) that involve a complex economic assessment, but no major balancing of different objectives, the Commission reviews if the supporting information are accurate and if the rationale is internally consistent and in line with economic theory [65]. For the choice of remedy and the principle of proportionality that involves a balancing between different objectives, control is less intensive and the Commission reviews whether the proposed measure is manifestly inappropriate with regard to the objectives of the NRF [66]. In practice [67], the Commission has made substantial comments on all three aspects of NRAs draft decisions, but the five vetoes all related to the second step of the analysis, i.e. the assessment of the dominant position [68]. In particular, the Commission considered that NRAs should have followed a so-called greenfield approach and not taken into account the regulation in place with regard to the analysed operator (On that approach, see DI MAURO & INOTAI, 2004). Otherwise, the reasoning of the NRA risks becoming circular, in the sense that the NRA will not find market power merely because it is curbed by existing regulation, then lift regulation, and then see market power re-emerging.

The second EU controlling player is the European Regulators Group (ERG), which was set up by a Commission Decision in 2002. The ERG is composed of representatives of the Commission and the 25 national

64 In effect, Information Society and Media Directorate-General jointly with the Competition Directorate-General. Note that from a polito-economic perspective, the mechanism has been showed to be efficient in the electronic communications sector because the cost for the Commission to force NRA to change decisions afterwards is so high that it makes sense to have a systematic *ex-ante* control: BARROS, 2004.

65 *TetraLaval* C-12/03P [2005] not yet reported, para 39. Note that this control has become more severe in recent years. Previously the control was limited to verifying whether the rules on procedure and on the giving of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or a misuse of powers: inter alia, *BAT and Reynolds* 142/84 and 156/84 [1987] ECR 4487, para 62; *Atlantic Containers* T-395/94 [2002] ECR II-875, para 257.

66 *Fedesa* C-331/88 ECR [1990] I-4023, para 14; CRAIG & de BURCA, 2002.

67 Annex 1 of 10th Implementation Report, at 69-74.

68 Commission Decision of February 20th 2004, FI/2003/24 and FI/2003/2; Commission Decision of October 20th 2004, AT/2004/90; Commission Decision of October 5th 2004, FI/2004/82; Commission Decision of May 17th 2005, DE/2005/111 and accompanying MEMO/05/162 of May 17th 2005, available at :
<http://forum.europa.eu.int/Public/irc/infso/ecctf/home>.

regulators [69], and provides an interface between its members to contribute to the development of a common regulatory culture through Europe. In practice, the ERG adopted general documents on SMP assessment or the choice of remedies [70], and more specific papers on bitstream access, accounting separation and cost accounting and the regulatory treatment of Voice over IP [71]. While these documents have surely paved the way towards greater harmonisation, their importance should not be overstated because they remain general (and sometimes theoretical) and do not stop member states from adopting divergent positions.

The third and the last EU controlling players are the European Courts (Court of Justice and Court of First Instance), which play three roles. Firstly, the Court controls member states (or their NRAs) by deciding on the infringement actions launched by the Commission. To-date, the Court has only ruled on a case regarding the late transposition of the NRF by two member States [72], but will soon have to decide on cases of incorrect implementation of the NRF by the legislators of several member states. Secondly, the Courts control the Commission by deciding on annulment actions. Any Commission antitrust decision may be appealed by a member state or an interested party [73], and the intensity of the judicial review is

---

69 Commission Decision of July 29th 2002 establishing the European Regulators Group for Electronic Communications Networks and Services, O.J. [2002] L 200/38, as modified by Commission Decision of September 14th 2004, O.J. [2004] L 293/30. See the website of ERG: <http://erg.eu.int>.

70 ERG Working Document of May 2003 on the SMP concept for the New Regulatory Framework, ERG (03) 09rev2; and Common Position on remedies.

71 Respectively, ERG Common Position of April 2nd 2004 on Bitstream Access, ERG (03) 33rev1; ERG Opinion of September 2004 on Accounting Separation and Cost Accounting ERG (04)15rev1; ERG Common Statement of February 2005 for VoIP regulatory approaches, ERG (05) 12. Note also that another group, the Independent Regulators Group, has also adopted Principles of Implementation and Best practices (PIBs) on several detailed regulatory issues like mobile call termination, cost recovery principle, local loop unbundling, LRIC cost modelling: PIBs of April 1st 2004 on the application of remedies in the mobile voice call termination market; PIBs of September 24th 2003 regarding cost recovery principles; PIBs of October 18th 2001 regarding Local Loop Unbundling (as amended in May 2002); PIBs of November 24th 2000 regarding FL-LRIC cost modelling.

72 Commission/Luxembourg C-236/04 [2005] not yet reported, and Commission/Belgium C-240/04 [2005] not yet reported. For the cases decided under the previous SMP regime, see the Commission Services Guide to the case law of the European Court of Justice in the field of Telecommunications 2003, available at:
<http://europa.eu.int/information_society/topics/ecomm/all_about/implementation_enforcement/index_en.htm>.

73 An interested party should prove a concern which is individual (i.e. the decision affect her in an individual manner by reason of certain attributes, which are particular to her and distinguish her just as in the case of the person to which the decision is addressed) and direct (i.e. the

limited to verifying whether the supporting information is accurate and if the rationale is internally consistent and supported by economic theory [74]. In practice, several decisions adopted in the electronic communications sector have been challenged, and in the majority of the cases, the European Courts endorsed the Commission position [75]. The Commission Article 7 vetoed decisions may equally be appealed by any member state or interested party [76] and the intensity of the Court's review follows the already explained two-pronged approach: a more intense (albeit still limited) control over comments related to the antitrust aspects of the draft decision, and looser control over comments related to the choice of remedies [77]. However, in practice, no Article 7 decision has yet been contested. Thirdly, the Court controls the national judicial bodies by answering preliminary ruling questions, thereby ensuring a common interpretation of European law. Given the criteria used by the European Court to determine whether a given entity constitutes a national court or a tribunal entitled to raise a preliminary question [78], a NRA could not directly ask the Court [79] a preliminary question. That would certainly save time and shorten proceedings, but may quickly

decision has a direct impact on her economic situation): *Plaumann* 25/62 [1963] ECR 95, as firmly reaffirmed in *Union de Pequenos Agricultores* [2002] ECR I-6677, para 36 and *Jégo-Quéré* C-263/02P [2004] not yet reported, para 45.

74 See note 65.

75 *Ex post* Article 82 EC cases: BT condemning decision upheld in *BI* (I) 41/83 [1995] ECR I-873; the ITT complaint rejection upheld in ITT T-111/96 [1998] ECR II-2937; Max.Mobil complaint rejection upheld in *Max.Mobil* T-54/99 [2002] ECR II-313, partly reformed in C-41/02P [2005] not yet reported. Ex ante Article 81 EC and Merger Regulation cases: RTL/Veronica/Endemol prohibition decision upheld in *Endemol* T-221/95 [1995] ECR II-1299; TPS go-ahead decision upheld in Metropole T-112/99 [2001] ECR II-2459; BSkyB/KirchPayTV go-ahead decision upheld in ARD T-158/00 [2003], not yet reported; Sogecable/ViaDigital referral decision upheld in *Cableuropa* T-346/02 and 347/02 [2003] not yet reported; WorldCom MCI/Sprint prohibition decision annulled for procedural reasons in *WorldCom* T-310/00 [2004] not yet reported. For more details on these cases, see GARZANITI, 2003; de STREEL, 2004.

76 It is not clear whether a member state or a private party would have enough to gain by challenging an Article 7 non-veto decision.

77 Regarding the Recommendation on relevant markets, we do not think an appeal is possible because such a legal act is, in principle, not reviewable and should not be re-qualified by the Court because the link between the Recommendation and the final imposition of remedies is fairly loose and an appeal would be better lodged in a specific situation against an Article 7 decision.

78 Such as whether the body is established by law, whether it is permanent, whether it applies rules of law, whether its jurisdiction is compulsory whether it is independent, whether its procedure is inter partes, and whether its final decision is judicial in nature: *Syfait* C-53/03 [2005] not yet reported.

79 Similarly, the Advocate General Geelhoed noted at para 45 of his Opinion in *Connect Austria* that the Austrian NRA could not ask a preliminary question to the Court, contrary to the pleading of the Austrian government.

lead to an overflow of questions in Luxemburg. In practice, the Court has not yet answered any preliminary question related to the new regulatory framework at this early implementation stage. However, it has clarified provisions of the previous 1998 regulation that are still relevant for the NRF such as the regulator's need for autonomy [80] or the type of appeal against an NRA decision [81].

**What about a European Regulatory Authority?**

Finally, there is no explicit European Regulatory Authority (ERA). This issue has been the hydra of telecommunication regulatory debate since the beginning of liberalisation. In 1994, the High Level Group on the Information Society, chaired by Commissioner Bangemann at the time, favoured the creation of an ERA with limited competencies (BANGEMANN, 1994:13). In 1997, an independent study for the Commission also favoured such an ERA with competencies limited to management of scarce resources and the resolution of access/interconnection disputes [82]. However in 1999, another independent study found no support in the industry for such an ERA and concluded that its cost would probably outweigh its benefits [83]. Literature on the subject is equally divided, with some authors (GERADIN & PETIT, 2004:61; KIESSLING & BLONDEEL, 1998:591; MELODY, 1999:20) favouring the ERA and others more sceptical (CAVE & CROWTHER, 1996:737). During the adoption of the new regulatory framework, the European regulator was probably one of the only political issues dividing the three branches of the European legislator. The Commission [84] was against such an authority because of the above-mentioned 1999 study and because of its long-standing ambivalence towards the creation of new institutions with which it may have to compete [85], and did not propose this move to the two other branches of European legislator [86]. The European Parliament was in favour of an authority that might enhance the establishment of an internal market for

80 *Lagauche* C-46/90 and C-93/91 [1993] ECR I-5267; *Decoster* C-69/91 [1993] ECR I-5335; *Taillandier* C-92/91 [1993] ECR I-5383.

81 *Connect Austria* C-492/99 [2003] ECR I-5197.

82 NERA/Denton Hall (1997).

83 Eurostrategies/Cullen International (1999).

84 1999 Communications Review, at 9.

85 Communication from the Commission of 11 December 2002 on the operating framework for the Regulatory Authorities Agencies, COM (2002).

86 Commission Proposal for the Framework Directive, OJ [2000] C 365E/198.

electronic communications. However, the Council of Ministers was strongly opposed to a fully-fledged ERA as encroaching upon the powers of their own NRAs [87]. In the end, the authority was not established, but an enhanced cooperation between the NRAs was set up with the creation of the ERG, giving the Commission significant new power to control NRA draft decisions. In the future, either the ERG or the Commission may become an implicit European regulator, but at this stage, it is too early to tell if that will happen or which institution will take the lead. However, it is certain that the issue of the European regulator will return at the next review of the NRF scheduled for 2006 [88], especially if the internal market is once again delayed by diverging regulatory approaches.

## ■ Governance principles and future improvements

An initial experience of nearly two years of implementation gives a preliminary impression of the fulfilment of the six governance principles in the context of the SMP regime. Two principles seem adequately fulfilled, two principles are in the fulfilment process and the last two have not been achieved.

### Flexibility and transparency: achieved principles

Flexibility and transparency are broadly achieved principles that are no longer problematic in the sector. The principle of flexibility is broadly achieved as, on the one hand, European law (hard and soft-law) allows for differentiation across member states, and on the other, NRAs were given a sufficient margin of discretion to adapt to dynamic market evolutions [89]. The principle of transparency has also been adequately fulfilled as public consultations are now systematically organised [90] and the vast majority of

87 Such authority would, indeed, have been quite different from the current co-ordination bodies set up at the European level, which are established on a purely inter-governmental basis and can only issue non-binding recommendations like ERO (European Radio-communications Office), or specialised recommendations like ETSI (European Telecommunications Standards Institute) or ENISA (European Network and Information Security Agency).

88 Communication from the Commission of June 1st 2005, i2010 – A European Information Society for growth and employment, COM (2005) 229, at 5.

89 With the exception of inappropriate national implementation, as stated in note 37.

90 With the exception of inappropriate national implementation, as stated in note 39.

information and decisions by NRAs and the Commission are available on the Internet.

**Objectivity: substantial progress**

The principle of objectivity and technological neutrality is much better satisfied than under the previous 1998 regulation as the relevant markets are defined according to the services provided and the preferences of consumers, and not according to technologies [91]. However, the Commission continues to adopt policy papers focusing on specific emerging technologies (like 3G, digital TV, Voice over IP, or Power-line Communications [92]) and is sometimes reluctant to adopt the full consequences of convergence.

**Subsidiarity and harmonisation: internal market re-loaded**

The principle of subsidiary and harmonisation means that the optimal level of governance needs to be found for each aspect of regulation. In the context of electronic communications, it implies a more harmonised regulatory culture. On the level of the deciding authorities (NRAs and Commission), these principles are surely better fulfilled than under the previous 1998 regulation. National regulators generally follow the market definitions proposed by the Commission in its Recommendation. They are also moving towards a common approach to remedies for all the major regulatory issues [93], even although divergences continue to reflect different national circumstances, as well as different levels of confidence in regulation

[91] For instance, that is why the Commission insisted that 2G voice and 3G voice should be part of the same relevant market. However, the application of technological neutrality is not always easy as illustrated by the divergence of opinions of the Commission and some NRAs on the need to include cable alongside telecom infrastructures for Market 12 (wholesale broadband access): Annex 1 of 10th Implementation Report, at 71.

[92] Communication from the Commission of 11 June 2002, Towards the Full Roll-Out of Third Generation Mobile Communications on 3G, COM (2002)301; Communication from the Commission of 17 September 2003 on the transition from analogue to digital broadcasting, COM(2003) 541; Commission Staff Working Document of 14 June 2004 on the treatment of Voice over Internet Protocol under the EU Regulatory Framework; Commission Recommendation of 6 April 2005 on broadband electronic communications through power lines, O.J. [2005] L 93/42.

[93] Note, however, that Germany tends to adopt a different approach to many controversial issues. For instance, its NRA is reluctant to regulate mobile markets: see GROEBEL, 2003.

to solve competition problems [94]. However, no trans-national market has yet been defined by the Commission and there are few pan-European offers, reflecting the small number of European operators (except Vodafone and Orange in the mobile segment) [95]. Thus, nearly twenty years after the launching of the liberalisation program [96] that was supposed to deliver an internal market for telecommunications, this objective has not been achieved. The main reasons are probably the lack of pan-European demand (at least for residential users) and the absence of a common regulatory culture under the previous regulation. It is too early to judge the impact of the NRF on the consolidation of the EU electronic communications industry and whether the progress made so far will be enough to deliver, but there is undoubtedly a tendency towards greater harmonisation [97].

The key elements of this improvement were the reforms introduced by the NRF and their proper functioning in practice [98]: positive interactions inside the ERG, which has led to the emergence of an esprit de corps between NRAs, the Article 7 review with the new pre-emptive powers of the Commission and the use of strongly Europeanised antitrust principles for sector regulation. However, this common regulatory framework relies mainly on voluntary cooperation among national regulators and no specific coordination mechanism exists between national courts, an increasingly important player. As an improvement, we suggest that NRAs and the Commission collaborate more closely in the spirit of loyal cooperation prescribed by the European Community Treaty [99]. If insufficient, the next revision of the NRF should move from the current system of a partnership of national bodies to a system of a steered network [100] similar to that resulting from competition law decentralisation, whereby the formal powers of the

94 A glance at Annex 2 reveals that some member states are more prone to regulation than others.

95 This absence of EU consolidation sharply contrasts with the situation in the USA. Indeed, in Europe, there has been only one successful cross-border merger between previous incumbents (Telia/Sonera), whereas in the USA, two major acquisitions occurred in 2005, although still under regulatory review (SBC/AT&T; Verizon/MCI).

96 Communication of the Commission of June 30th 1987, Towards a Dynamic European Economy: Green Paper on the Development of the Common Market for Telecommunications Services and Equipment, COM (87) 290.

97 The same authors that were critical of the previous regulation acknowledge the important progress made by the NRF: LAROUCHE, 2002.

98 10th Implementation Report, at 11.

99 Article 10 EC.

100 Following the expression of SAPIR, 2004.

Commission are much more important [101]. However, it is neither necessary nor politically feasible at this stage to be more radical and provide for a European regulator, equivalent to the US Federal Communications Commission. Secondly, to guarantee harmonisation among the judicial bodies, national courts should set up informal devices to exchange information and best practices [102]. If insufficient, mechanisms similar to those of antitrust decentralisation (like the possibility of the Commission to intervene as amicus curiae in the national court proceedings [103]) could be set up.

**Minimum regulation: the fallacy of the 'less regulation' rhetoric [104]**

Although the NRF was meant to be de-regulatory, the initial application of this regulation goes in exactly the opposite direction [105]. Regulatory creep was already denounced in 1998 regulation [106] and continues under the NRF, although not to the same extent in every member state. It seems that the regulators are extending regulation designed for old legacy networks to the new Schumpeterian infrastructures deployed under competitive

101 Indeed, in a steered network system, the Commission might remove a national authority from a case and decide it instead: Article 11(6) of the Regulation 1/2003 and para 50-57 of the Commission Notice of March 30th 2004 on cooperation within the Network of Competition Authorities, O.J. [2004] C 101/43.

102 Possibly inside the European Judicial Network, although this forum is mainly suited for cross-border disputes, rather than to ensure the consistency of decisions concerning purely internal disputes: Council Decision of May 28th 2001 establishing a European Judicial Network in civil and commercial matters, O.J. [2001] L 174/25; see also: <http://europa.eu.int/comm/justice_home/ejn/index.htm>.

103 Article 15 of the Council Regulation 1/2003, and Commission Notice of March 30th 2004 on the co-operation between the Commission and the courts of EU member states in the application of Articles 81 and 82 EC, O.J. [2004] L 101/54. This amicus curiae procedure may be heavy as it requires a decision by the Commission.

104 In this section, we focus on the extension of sector regulation. However, the NRF may also lead to an extension of antitrust law in the electronic communications sector and in other sectors because the European and the national competition authorities could use their comments under the SMP regime to try extend antitrust doctrines outside the control of the Courts.

105 Tellingly, while the first speeches of the Commissioners in charge of Information Society or Competition were referring to 'less regulation', they are now referring to the more cautious notion of 'better focus regulation'.

106 In some ways, the exchange of best practices under the 1998 package seems to be one-sided. It refers to regulatory practices, and not to de-regulatory ones.

conditions [107]. At this stage, we cannot prove that regulators have intervened beyond the optimal level because that would require a clear and articulated definition of optimal regulation in the sector, as well as a full cost-benefit analysis that has not be carried out and is beyond the scope of this paper. However, it is a fact that the never-ending expansion of regulation does not match the deregulatory rhetoric. Our intuition is that this may correspond to over-regulation [108] and my fear is that the regulatory brakes contained in the NRF are not sufficiently employed. To make things worse, the procedures are much more complex for any move by the NRA, either towards additional regulation or even towards deregulation. Indeed, the three-step SMP regime involves collection of a huge amount of market data, which is not always available from the marketing departments of operators, as well as many complex economic assessments.

This regulatory creep may be explained by the fact that NRF has not sufficiently taken into account the incentives of the regulatory authorities and the well-known problem of state bureaucracy, which reflects the fact that once established, regulatory bodies tend to perpetuate and enlarge their activities [109]. This is all the more dangerous since NRF has extended the potential of regulation in two ways: firstly, by enlarging the scope of regulation from telecommunications networks to all electronic communications networks in order to take into account convergence (thereby including media infrastructure for example), and secondly, by changing the regulatory paradigm from the original sin (i.e. regulation limited to infrastructure deployed under legal monopoly) to the relative efficiency of antitrust remedies compared to sector regulation remedies (thereby extending

---

107 This danger was feared by the vast majority of observers on the eve of the implementation of the NRF: CAVE & CROWTHER, 2004:28; DOBBS & RICHARDS, 2004:729; OLDALE & PADILLA, 2004:76. In particular GUAL (2002) and Criterion Economics and DOTECON (2003) were wary that intrusive narrowband regulation would be extended as such and without adaptation to the broadband market segment.

108 This is implicitly recognised by Ofcom (2004:11), which notes that "Increasingly detailed regulation has been introduced. This has created a regulatory mesh which places a series of obligations on BT at the retail and wholesale levels. While all individually justifiable, the combination of obligations created additional costs and often conflicting incentives. This is particularly so when competition is promoted at multiple layers of the value chain, using a variety of overlapping regulatory instruments".

109 LAFFONT & TIROLE (2000:141) note that, "One of our concerns with current regulatory reforms is that, beyond the liberalization and free-market rhetoric, one may be creating an environment that will lead to heavy-handed regulatory intervention". See also the interesting observations of STERN (2004) who contrasts the de-regulatory stance of Ofgem in a market where technological progress is relatively slow and natural monopoly conditions are prevalent, with the regulatory stance of Oftel where technological progress increases the possibility of effective competition, and of WAVERMAN (2003).

potential regulation to infrastructure developed under competitive conditions). Regulatory actors need to change their attitudes: NRAs should take the principle of proportionality more seriously, and in particular, be creative about choosing remedies that would lead to de-regulation; the Commission should remove several markets from the next Recommendation foreseen for mid-2006 [110] and more strongly encourage national regulators to forbear during the Article 7 review; NCAs should strictly control NRAs (and not use the implementation of the NRF to expand antitrust concepts outside the review of the courts); while National Courts, and ultimately European Courts, should review the application of the proportionality principle with more intensity than normal under economic policy. In addition, procedures for market analysis should be simplified.

**Legal certainty: risky business**

At this stage, the application of the NRF has not led to legal certainty because operators are not sufficiently confident as to whether and how they will be regulated. The regulatory agencies do not have a clear strategy and it is difficult to determine their positions on two fundamental and related questions: whether the regulator should actively promote entry or merely prohibit abuse of dominant position and whether it should promote infrastructure competition or service competition (DOBBS & RICHARDS, 2004:718; HOCEPIED & de STREEL, 2005:151). In practice, the European Regulators Group and the Commission [111] argue that there is no conflict between both types of competition when the time dimension is taken into account. On the basis of the so-called ladder of investment theory (CAVE & VOGELSANG, 2003; CAVE, 2004b), NRAs should provide incentives for competitors to seek access from the incumbents in the short term and to build their own infrastructure in the long term. However, the theory is not easy to apply in practice and does not evaluate the balance to be struck

[110] We suggest removing all the retail markets (markets 1 to 6), the wholesale fixed transit (Market 10), the wholesale trunk segment of leased lines (Market 14), wholesale mobile access and call origination (Market 15), and wholesale international roaming (Market 17). For the markets of fixed transit and mobile access and call origination, the Commission already indicated in the Explanatory Memorandum of the first Recommendation on relevant markets (respectively at p. 19 and p. 30) that it may remove them from the next Recommendation. See also along these lines, Ofcom (2004:17). Note that this suggestion does not imply that these markets could not be regulated by NRAs, but only that the Commission may veto such regulation. In order words, it will be more difficult, albeit not impossible, to intervene in these markets.

[111] Common Position on remedies, at 64; MONTI, 2004.

between short-term and long-term considerations. Some go further and argue that the theory is based on false presumptions that a national regulator can micro-manage the industry and that it will stick to the theory over time (OLDALE & PADILLA, 2004:71-76). This absence of a clear strategy is particularly damaging for emerging markets, whose status is largely unclear under the NRF [112]. On the one hand, regulatory players note that emerging markets should not be subject to inappropriate obligations, as that may unduly influence their competitive developments and undermine investment incentives. On the other hand, they note that intervention might be justified to alleviate foreclosure of such emerging markets. In addition to this general uncertainty, multiple regulatory agencies with overlapping competence are involved, leading to possible jurisdictional conflict and forum shopping between regulators (GERADIN, 2004; LAROUCHE, 2005; PETIT, 2004).

This lack of legal certainty may be due to several reasons. Firstly, the NRF is based on a false underlying assumption that over-estimates the strengths of antitrust principles (LAROUCHE, 2002:137). These principles do not deliver more legal certainty as originally expected [113], and on the contrary, may increase uncertainty because they create confusion between antitrust objectives (maintaining a competitive structure that is broadly satisfactory) and the objectives of sector regulation (improving competitive structure by stimulating entry in the market). Secondly, the NRF itself does not give clear and unambiguous indications to solving major regulatory questions like the type of competition that should be promoted. Indeed, the three objectives of the Framework Directive look more like a catalogue than a coherent statement. Moreover, the soft law accompanying instruments do not provide clear objectives. Furthermore, regulatory agencies are reluctant to commit to a particular strategy because of the high uncertainty of future technological and market evolutions and the intense lobbying they face. Thirdly, the NRF is not based on practical experiences, but more on theoretical models, which implies an inevitable learning curve for regulatory agencies. Policymakers should state their regulatory strategy more clearly

---

[112] See Recital 27 of the Framework Directive, Guidelines on market analysis, para 32, Recommendation on relevant markets, recital 16, Common Position on remedies, at 20 and 89.

[113] Indeed, the application of antitrust principles to a specific case is far from clear, all the more so since many of these principles recently underwent a fundamental reform oriented towards a more economic approach. Although the same uncertainty is generated by the use of antitrust concepts in competition policy and in sectoral law, the effects of this uncertainty are more damaging under the latter than under the former because sectoral law is more prevalent.
See, for instance, the Strategic Review of the UK regulator Ofcom (2004).

by deciding on the difficult political choice between infrastructure competition and service competition, as well as clarifying whether sector regulation should, and for how long, actively promote entry. If possible, this strategy should show how and when the deregulation of the sector would happen. In particular, clarifications regarding the status of emerging markets are urgently needed (for proposed clarifications, see Ovum & Indepen, 2005).

## ■ Conclusion

This paper studies whether the initial implementation of the recently reformed Significant Market Power regime has achieved the six governance principles on which it was based. We conclude that two principles (flexibility and transparency) are broadly met, that two principles (objectivity and harmonisation) are much better achieved than before, but still insufficiently realised, and that the last two principles (minimal regulation and legal certainty) have regressed and are less achieved than before. The reason for such shortcomings is that the design of the NRF did not sufficiently take into account the incentives of the regulatory agencies, mystified the antitrust principles dangerously, and did not arbitrate between different policy options sufficiently. Yet, do not think that a radical change in the near future will be needed or is appropriate for a regulatory regime that is still learning. Instead, a change in the attitude of regulators is required. The National Regulatory Authorities should forbear more frequently, set out their strategies more clearly (particularly with regard to the regulatory treatment of emerging markets), and cooperate loyally with their European counterparts. The National Competition Authorities should play an active role in the process, trying to limit intervention by NRAs when necessary, while taking into account the context of sector regulation. The Commission should exercise its powers forcefully to alleviate regulatory creep and ensure a common regulatory culture for the consolidation of internal markets. The national and European Courts should review the principle of proportionality more closely. Otherwise, a new and simpler regulatory model will have to be developed.

**References**

BANGEMANN M. (1994): "Europe and the Global Information Society: Recommendation to the European Council", Report of the High Level Group on Information Society.

BARROS P.P. (2004): "The Economics of EU's Consultation Mechanism in Telecommunications", Mimeo.

British Institute of International and Comparative Studies (2004): *Effective Access and Procedure in Telecommunications Disputes in Europe*.

BUIGUES P. (2004): "A Competition Policy Approach", in P. Buigues & P. Rey (eds.), *The Economics of Antitrust and Regulation in Telecommunications*, E. Elgar Publishing, pp. 9-26.

CAVE M.:

- (2004a): "Economic Aspects of the New Regulatory Regime for Electronic Communication Services", in P. Buigues & P. Rey (eds.), *The Economics of Antitrust and Regulation in Telecommunications*, E. Elgar Publishing, pp. 27-41.
- (2004b): "Making the ladder of investment operational", Mimeo.

CAVE M. & CROWTHER P.:

- (1996): "Determining the level of regulation in EU telecommunications: A preliminary assessment", in *Telecommunications Policy*, 20, pp. 725-738.
- (2004): "Co-ordinating regulation and competition law – *ex ante* and *ex post*", in Bergman M. (ed), *The Pros and Cons of Antitrust in Deregulated Markets*, pp. 11-28.

CAVE M. & VOGELSANG I. (2003): "How access pricing and entry interact", in *Telecommunications Policy*, 27, pp. 717-727.

CHOUMELOVA D. & DELGADO J. (2004): "Monitoring competition in the telecommunications sector: European Commission Sector Enquiries", in P. Buigues & P. Rey (eds.), *The Economics of Antitrust and Regulation in Telecommunications*, E. Elgar Publishing, pp. 269-284.

CRAIG P. & de BURCA G. (2002): *EU Law*, 3rd ed, Oxford University Press.

Criterion Economics and Dotecon (2003): *Competition in broadband provision and its implications for regulatory policy*, Report for the Brussels Round Table.

DI MAURO L. & INOTAI A. (2004): "Market Analyses under the New Regulatory Framework for Electronic Communications – Context and Principles Behind the Commission's First Veto Decision", Comp. Policy Newsletter 2, pp. 52-55.

DOBBS I. & RICHARDS P. (2004): "Innovation and the New Regulatory Framework for Electronic Communications in the EU", in *Eur. Comp. Law Rev.*, pp. 716-730.

ECTA (2004): *Regulatory Scorecard*, Report done by Jones Day and SPC Network.

Eurostrategies/Cullen International (1999): "The possible added value of a European Regulatory Authority for telecommunications", Study for the European Commission.

GARZANITI L. (2003): *Telecommunications, Broadcasting and the Internet: EU Competition Law and Regulation*, 2nd ed., Sweet & Maxwell.

GERADIN D. (2004): "Limiting the Scope of Article 82 of the EC Treaty: What can the EU learn from the US Supreme Court's Judgement, in *Trinko in the wake of Microsoft, IMS*, and *Deutsche Telekom*", *Common Market Law Rev*. 41, 1519-1553.

GERADIN D. & PETIT N. (2004): "The Development of Agencies at EU and National Levels: Conceptual Analysis and Proposals for Reform", Jean Monnet Working Paper 01/04.

GILARDI F. (2005): "Evaluating Independent Regulators", Report presented at the OECD Expert Meeting on High quality regulation.

GROEBEL A. (2003): "Should we regulate any aspects of wireless?", in *Telecommunications Policy*, 27, pp. 435-455.

GUAL J. (2002): "Regulation and the development of electronic communications in Europe", in *Info,* 4, pp. 42-49.

HANCHER L., LAROUCHE P. & LAVRIJSSEN S. (2003): "Principles of Good Market Governance", in *Jour. of Network Industries*, 4, pp. 355-389.

HOCEPIED C. & de STREEL A. (2005): "The ambiguities of the European electronic communications regulation", in E. Dommering & N. van Eijk (eds.), *Round Table Expert Group on Telecommunications Law*, University van Amsterdam, pp. 139-190.

ICN-International Competition Network (2005): "Antitrust Enforcement in Regulated Sectors Working Group", Report to the Fourth Annual Conference.

KIESSLING T. & BLONDEEL Y. (1998): "The EU regulatory framework in telecommunications: A critical analysis", in *Telecommunications Policy*, 22, pp. 571-592.

KRÜGER R. & DI MAURO L. (2003): "The Article 7 consultation mechanism: managing the consolidation of the internal market for electronic communications", in *Comp. Policy Newsletter* 3, pp. 33-36.

LAFFONT J.J. & TIROLE J. (2000): *Competition in Telecommunications*, MIT Press.

LAROUCHE P.:

- (2000): *Competition Law and Regulation in European Telecommunications*, Hart.
- (2002), "A closer look at some assumptions underlying EC regulation of electronic communications", in *Jour. of Network Industries*, 3, pp. 129-149.
- (2005), "Co-ordination of European and Member State Regulatory Policy: Horizontal, Vertical and Transversal Aspects", in Geradin D., Munoz R. & Petit N. (eds.), *Regulatory Authorities in the EC: A New Paradigm for European Governance*, E. Elgar Publishing.

MELODY W.H. (1999): "Telecom reform: progress and prospects", in *Telecommunications Policy*, 23, pp. 7-34.

MONTI M. (2004): "Remarks at the European Regulators Group Hearing on Remedies", Speech 26 January.

NICOLAIDES Ph. (2005): "Regulation of Liberalised Markets: A New Role for the State? (or How to Induce Competition Among Regulators?)", in Geradin D., Munoz R. & Petit N. (eds.), *Regulatory Authorities in the EC: A New Paradigm for European Governance*, E. Elgar Publishing.

NIHOUL P. & RODFORD P. (2004): *EU Electronic Communications Law: Competition and Regulation in the European Telecommunications Markets*, Oxford University Press.

NERA/Denton Hall (1997): "Issues Associated with the Creation of a European Regulatory Authority for Telecommunications", Study for the European Commission.

OECD:

- (1999a): *Relationship between Regulators and Competition Authorities*, DAFFE/CLP(99)8.

- (1999b): *Telecommunications Regulation: Institutional structures and responsibilities*, DSTI/ICCP (99)15.

Ofcom:

- (2004): "Strategic Review of Telecommunications: Phase 2 Consultation Document".

- (2005): "Strategic Review of Telecommunications: Summary of responses to Phase 2 consultation".

OLDALE A. & PADILLA A.J. (2004): "From state monopoly to the 'investment ladder': competition policy and the NRF", in Bergman M. (ed), *The Pros and Cons of Antitrust in Deregulated Markets*, pp. 51-77.

Ovum and Indepen (2005): "Regulating Emerging Markets?", Study prepared for OPTA.

PETIT N. (2004): "The Proliferation of National Regulatory Authorities alongside Competition Authorities: A Source of Jurisdictional Confusion", GCLC Working Paper 02/04.

SAPIR A. *et al.* (2004): *An Agenda for Growing Europe*, Oxford University Press.

SIDAK J.G. (2004): "The failure of good intentions: the collapse of American telecommunications after six years of deregulation", in Robinson C. (ed), *Successes and Failures in Regulating and Deregulating Utilities*, E. Elgar Publishing, pp. 1-15.

STERN J. (2004): "Regulatory forbearance: why did Oftel find it so hard?", in *Telecommunications Policy*, 28, pp. 273-294.

STEVENS D. & VALCKE P. (2003): "NRAs (and NCAs?): the Cornerstones for the Application of the New Electronic Communications Regulatory Framework, in *COMMUNICATIONS & STRATEGIES*, 50, pp. 159-189.

(de) STREEL A. (2004): "Remedies in the Electronic Communications Sector", in D. Geradin (ed), *Remedies in Network Industries: EC Competition Law vs. Sector-specific Regulation*, Intersentia, pp. 67-124.

UNGERER H. (2001): "Use of EC Competition Rules in the Liberalisation of the European Union's Telecommunications Sector", Speech 6 May.

WAVERMAN L. (2003): "Regulatory incentives and deregulation in telecommunications", in C. Robinson (ed), *Competition and Regulation in Utility Markets*, E. Elgar Publishing, pp. 138-159.

## Annexes

### Annex 1 - Markets defined in the Commission Recommendation on relevant markets

***Retail markets***

| | |
|---|---|
| *Fixed voice* | 1. Access to the public telephone network at a fixed location for residential customers<br>2. Access to the public telephone network at a fixed location for non-residential customers<br>3. Publicly available local and/or national telephone services provided at a fixed location for residential customers<br>4. Publicly available international telephone services provided at a fixed location for residential customers<br>5. Publicly available local and/or national telephone services provided at a fixed location for non-residential customers<br>6. Publicly available international telephone services provided at a fixed location for non-residential customers<br>7. Minimum set of leased lines |

***Wholesale markets***

| | |
|---|---|
| *Fixed Narrowband* | 8. Call origination on the public telephone network provided at a fixed location (for voice and Internet dial-up calls)<br>9. Call termination on individual public telephone networks provided at a fixed location (for voice call only)<br>10. Transit services via the fixed public telephone network |
| *Fixed Broadband* | 11. Wholesale unbundled access (including shared access) to metallic loops and sub-loops for the purpose of providing broadband and voice services<br>12. Wholesale broadband access |
| *Fixed dedicated access* | 13. Wholesale terminating segments of leased lines<br>14. Wholesale trunk segments of leased lines |
| *Mobile voice* | 15. Access and call origination on public mobile telephone networks (MVNO)<br>16. Voice call termination on individual mobile networks<br>17. International roaming on public mobile networks |
| *Broadcasting* | 18. Broadcasting transmission services, to deliver broadcast content to end-users |

**Annex 2 - Results of market analysis as of June 2005 (*)**

| | AT | DE | DK | EL | FI | FR | HU | IE | PT | SE | SI | SK | UK |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 1 | XX | | - | | X | | XX | D XX | XX | XX | | XX | D XX |
| 2 | XX | | - | | X | | XX | D XX | XX | XX | | XX | D XX |
| 3 | X | | | | D X/- | | X | D XX | D XX | | | | D XX |
| 4 | - | | | | -V | | X | D XX | XX | | | | D XX |
| 5 | X | | | | D X/- | | X | D XX | D XX | | | | D - |
| 6 | X | | | | -V | | X | D XX | XX | | | | D - |
| 7 | D XX | | XX | | X | | X | D XX/-/ | XX | XX | | | D XX |
| 8 | X | D x | D XX | | XX | | XX | | XX | XX | | X | D XX |
| 9 | XX | xV | | | XX | | XX | | XX | XX | | XX | D XX |
| *10* | -V | D x/- | | | D X- | | - | | - | XX | | | D XX |
| 11 | XX | D XX/- | XX | | XX | XX | XX | XX | | XX | XX | XX | D XX |
| 12 | | | | | D X | XX | XX | XX | XX | XX | | | D XX |
| 13 | XX | | | | X | | XX | XX | XX | | | | D XX |
| *14* | - | | | | - | | - | XX | XX | | | | D XX |
| 15 | - | | | | XV - | | - | X | | | | | - |
| 16 | X | | | XX | XX | XX | XX | x | XX | XX | | XX | XX |
| 17 | | | | | | | | | | | | | |
| 18 | D | | | | D XX | | | D X | | | | | D *XX* |
| | 16 | 4 | 5 | 1 | 17 | 3 | 16 | 14 | 14 | 9 | 1 | 6 | 17 |

(*) Only the Member States whose market analysis have been reviewed by the Commission as of mid-June 2005 are listed.

D: Different market definitions than those of the Commission Recommendation
XX: Heavy regulation ( i.e. imposition of the full suite of remedies available, or at least price control remedy)
X: Light regulation (i.e. imposition of some of the remedies available, but not full suite or price control)
-: No regulation
x: Remedies not yet decided
V: Commission Veto